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## ANGLO-SAXON FEUDALISM

IN no country of Europe did the feudal system exert, either on public or private law, a more profound or more permanent influence than in England. In regard to public law it is enough to refer to the fact that the controlling principle which created the English limited monarchy was found in feudal law, or to this that the organization of the English judicial system of the present day bears plainly the marks of its feudal origin. In the field of private law it is doubtful if there is any country, certainly not any entire country, where the principles of feudalism were so thoroughly and so logically applied to the land law as in England, and it is an interesting fact that in some of the United States after a lapse of six hundred years considerable trouble and expense may be occasioned by statutes framed in England at the end of the thirteenth century to protect the interest of the feudal lord, if the writer of a conveyance is careless in the form of words which he uses.

Since this is the case it is important to know—hardly any merely historical question is more important in fact—when and under what circumstances the feudal system entered English history. Was it an indigenous product? Was it introduced fully formed at a certain date from abroad? Are both these suppositions in part true? Was the feudal system in process of formation in England when that natural growth was cut off by the grafting upon it of a more complete system which had grown up elsewhere, a system that differed from the native English only in being more perfectly developed?

Professor Maitland's *Domesday Book and Beyond* seems to give an answer to these questions which strongly supports the theory that the feudal system was forming in England before the Norman Conquest, or one at least which tends to shake the faith of those who have held that feudalism was first introduced by the Conqueror. It would be improper to consider Mr. Maitland's book an argument for the existence of feudalism in Saxon England. It is rather a full statement of the facts as he finds them in the records with some explanatory comment and the raising of various questions suggested by them which are for the most part left without definite answer. The book is a fine example of undogmatic scientific work, much less dogmatic than most men would have made it. It does, how-

ever, unquestionably create the impression that institutionally the Conquest made no really important change, that it introduced no important practical differences, but that at most it brought in institutions which were not different in kind but only some stages further along in a development which had been long under way in England itself.<sup>1</sup>

The argument for Anglo-Saxon feudalism which is presented in this limited way rests upon the existence before the Conquest of three groups of institutional facts. dependent tenures, private jurisdictions, and military service as an element in land tenure. The special question here is this: if we grant the existence of these facts in Saxon England have we admitted the existence there of the feudal system proper, as it existed in England at the end of the eleventh century, less fully developed in the earlier time perhaps, but institutionally the same system? Have we admitted that that development was going on there which, advancing more rapidly in the Frankish state, had produced completed feudalism two hundred years before the Conquest, and which if left to itself would have produced the same system in England? Have we admitted that the Conquest introduced nothing which was new in principle but merely principles more logically worked out?

The answer we give to this question will depend largely on the meaning we attach to the word "feudalism." This word is used at present as many words in its own medieval vocabulary were used, in a narrow and technical, and at the same time in a broader and more general sense. We sometimes mean by it the special system

<sup>1</sup> "And thus we see already a feudal ladder with no less than five rungs." *Domesday Book and Beyond*, p. 155.

"Feudalism was not perfected in a day. Still here [the five hide system] we have the root of the matter . . . ." P. 159.

"We are not doubting that the Conqueror defined the amount of military service that was to be due to him from each of his tenants in chief, nor are we suggesting that he paid respect to the rule about the five hides, but it seems questionable whether he introduced any very new principle. A new theoretic element may come to the front, a contractual element:—the tenant in chief must bring up his knights because that is the service that was stipulated for when he received his land. But we cannot say that even this theory was unfamiliar to the English." P. 160.

"Whether a man who will lose land for such a cause [failure of military service] shall be said to hold it by military service is little better than a question about the meaning of words. At best it is a question about legal logic." P. 295.

"Dependent tenure is here and, we may say, feudal tenure, and even tenure by knight's service, for though the English *cniht* of the tenth century differs much from the knight of the twelfth, still it is a change in military tactics rather than a change in legal ideas that is required to convert the one into the other." P. 309.

To the interesting and suggestive introduction to Essay II, pp. 220–226, no exception can be taken since it is made entirely clear that the subject is feudalism in the wide not in the institutional sense.

of ideas and law relating to fiefs and to the services by which they were held which prevailed in the European world between the ninth and the fourteenth centuries. Sometimes we include in the term everything which seems characteristic of that society from top to bottom—the arithmetical sum total of its peculiarities, without distinction of origin or relationship. In this latter sense serfdom is as truly a part of feudalism as the system of fiefs; in this sense we find feudalism wherever some of these characteristics are to be found—in Japan, in some Mohammedan states, in various African communities of the present day,<sup>1</sup> without inquiring whether the institutions of feudalism in the narrower sense occur in these places or not.

But in the study of medieval institutions should we not raise the question whether sharper distinctions than this are not possible and necessary?<sup>2</sup> Must we not seek to determine more specifically the source of the determining features of the age and of its most important permanent influences in history? Is it not possible that the peculiar economic and political conditions which prevailed over Europe from the fourth century to the tenth produced a number of groups of peculiar institutional forms adapted to meet the more or less permanent needs of different sorts which arose from those conditions, and often in appearance closely related to one another; that some of these forms speedily perished; that others survived and passed on to later times; that among those surviving was one group of institutions which, by the importance of the relationships and of the classes which it primarily concerned, at once obtained a controlling position in the age that followed its origin, drew under its influence and moulded into a great system the other institutions that had survived like itself, and stamped its impress upon all the features of an age which we call the age of feudalism because this dominating and controlling element was the feudal system proper, the system in which the fief was a fundamental element?<sup>3</sup>

<sup>1</sup> Japanese feudalism is often referred to. On Mohammedan see Von Tischendorf, *Das Lehnwesen in den Moslemischen Staaten*. Leipzig, 1872. On African see Herbert Spencer, *Descriptive Sociology*. Vol. on Africa, Tables XXI., XXVIII., and XXX.

<sup>2</sup> "Eben solche Institutionen aber, die weit über den ursprünglichen Boden der Entstehung hinaus ihre Wirkung erstrecken, verdienen vor allem in ihren oft dunklen Anfängen und auf den ersten Stufen der Entwicklung, so vollständig und so scharf wie möglich ist, ermittelt und festgestellt zu werden: es gilt zugleich das Charakteristische zu erfassen und der Mannigfaltigkeit der Thatsachen, die sich allmählich in bestimmtere Formen fügen, gerecht zu werden." Waitz, *Deutsche Verfassungsgeschichte*, Bd. IV. p. 361.

This paragraph follows immediately those quoted at the end of this article.

<sup>3</sup> Feudal comes of course from *feudum*, fief, and the fief was normally an estate held by this sort of tenure, and in strictness feudalism is the system of such estates and tenures only. That the word "fief" was in England applied to all freeholds ought not to confuse us as to its real meaning. It is quite possible that this was a usage transferred from

That this was the fact is at least the underlying assumption of this article, and its special thesis is that those characteristics of feudalism in the wider sense, which Mr. Maitland has shown, more clearly than any one before him, to have existed in Saxon England, are not in the line of the ancestry of feudalism proper. They are to be classed among the other products of the pre-feudal age, the products which disappeared, or if they survived were brought under the influence of feudal ideas and into the system which these controlled. The manor for example appears to be a characteristic feudal institution because feudalism, coming into existence alongside the manorial system, though from a different and independent origin, and finding this method of exploiting a great estate perfectly adapted to certain fundamental needs of its own, seized on it and interpreted according to its own ideas forms and processes which had been originally in no proper sense feudal.<sup>1</sup> This must not be understood

Normandy where it also prevailed, and that it was a result of the logical completeness of feudalism in that country. There was a similar use of the term locally elsewhere for tenures not strictly feudal, as in Brittany and Toulouse. See Glasson, *Histoire du Droit et des Institutions de la France*, Tome IV. pp. 285-6. If we follow, however, the suggestion made in the chapter on Norman Law in Pollock and Maitland's *History of English Law*, that this was a "generalization" not yet consciously reached in Normandy, but arrived at in England as early as the Domesday Book, it must have been brought into consciousness there not by the actual facts of tenure, but by the treatment of the conquered lands, and the body of facts, the data of experience, to which reference was made for the explanation of this treatment, must have been in the main Norman and not English. The rapid feudalization of England by the act of the king would force the theory into attention, perhaps as accounting for the king's right, at any rate as explaining the process, but it is not a generalization in the sense that it is a legitimate inference from the facts as they ever existed anywhere. It is rather a generalization of the purely theoretical sort, one which states the ideal, and it is a more logical form of the notion which prevailed in parts of France and Germany that the great allods must be really fiefs, held according to one explanation of God and according to another of the sun. It is indeed the same idea as that expressed in the later French maxim, *Nulle terre sans seigneur*, and in both cases alike whatever conformity to this theory there ever was in the facts was due to the lawyers. It was the effort, more or less conscious, to realize this theory in the facts or to see it in previously existing arrangements, which extended feudal ideas, and especially the feudal vocabulary, into spheres not originally belonging to them, most of all into lower spheres.

<sup>1</sup> It seems necessary to take an appeal from Mr. Maitland's idea of what constituted a manor as stated in *Domesday Book and Beyond*, p. 120—"A manor is a house against which geld is charged," of which see Mr. Round's criticism in the *English Historical Review*, Vol. XV., p. 293—to his opinion as expressed in 1888, in *Select Pleas in Manorial Courts*, *Selden Society*, p. xl. In speaking of the manor of the thirteenth century he says: "What as yet gave it its unity was rather economic practice than legal doctrine. It was an estate which could be and was administered as a single economic and agrarian whole. When men spoke of a manor, they thought primarily of the single group of tenants who worked in common at their plowings and their reapings, of the single hall or manor house whose needs were supplied, whose larders and garners were filled, by the labors of this group. An estate too large or too scattered to be managed in this way would not, according to the common use of words, be a manor." And, we may add, no matter how small an estate was, if managed by itself and as an independent economic unit, it might be called a manor. No other statement than this of what a manor was in

to mean that the term feudal is improperly applied to the wider range of institutions, if we understand clearly the use we make of it and are led to no confusion of mind thereby. But it does mean that those institutions do not properly belong to that special system which makes the middle ages distinctively feudal, as the great feudal age in the history of the world, to the system from which the most important legal and institutional consequences followed in England and elsewhere, but that they belong either to systems which were gradually supplanted by feudalism proper, or which were clearly distinguished from it in the days of its supremacy as different and subordinate systems.

1. In the matter of dependent tenure, the tendency is almost irresistible to regard all forms of dependent tenure as alike feudal. In the wide sense already explained it is proper enough to call them so, at least after feudalism is fully established. No fact is more characteristic of the age when feudalism was at its height than the great variety of these tenures. They are essential to our conception of the feudal society from its highest ranges to its lowest, and it is necessary to consider whether all these dependent tenures were in reality feudal in the institutional sense of the term; whether the development of dependent tenures of any kind means a growth towards feudalism. When we seek for light upon this question, two facts at once strike us as very suggestive.

First, that while great variety of tenure is just as characteristic of the earlier age out of which feudalism is seen slowly emerging, as of the feudal age proper, it is from one group of these earlier tenures only that this emergence takes place; only one particular kind of ante-feudal dependent tenures grows into the feudal proper.

Second, that in the feudal age itself while all tenures have certain important features in common, a clear distinction is drawn, clear to the men of that time at least, between certain which are feudal proper, and two other classes which are not.

It is not necessary to take space here to prove the first of these propositions. The proof has been repeatedly made, perhaps in its most complete form by Fustel de Coulanges, in his *Institutions Politiques de l'Ancienne France*, but though he carries the line of descent further back, his conclusions on this matter do not differ in

the feudal age, of the purpose for which it existed, of the test which distinguished it from the non-manor, will satisfactorily explain all the facts—such facts, for example, as the formation of one manor within another, of the union of two manors together, or the attachment to a manor of outlying bits of land not formerly belonging to it, all apparently at the sole will of the proprietor. It is the efficiency of administration, the economic convenience, or the economic relationship to a given person, which are the controlling considerations.

any essential particular from those of Waitz, less plainly stated, or from those now universally accepted. The tenure called *precarium*, originating in Roman days, modified greatly in character in its extensive use by the church, widely extended in practice as a means of protection in the turbulent days of the founding and ordering of the Frankish state, became at last the direct ancestor of the feudal tenure proper<sup>1</sup> because it was resorted to by the Carolingian Mayors as the means of providing for the change in military tactics which was forced upon them by the attack of the Arabs in the eighth century.

But it is perhaps necessary to emphasize the fact that the feudal system was not created by any development whatever of this *precarium* tenure along the natural lines of its own development. To the end of time it would not have created feudalism if left to itself. It might have grown into something which could have been properly called a feudalism, as we speak of the feudalism of Japan, but it would have been institutionally, in form and consequences, quite different from the actual, historical feudalism of western Europe. It was because peculiar circumstances in the Frankish state made it essential to the safety of the state to combine with this institution another, of a personal and not of a property character, which had had a different origin and a different history, to combine these two quite different institutions together as the two sides of a single and really new institution, mainly political, not economic in character, that feudalism arose.

The second of these propositions, that a clear distinction was made in feudal times between certain tenures properly feudal and two other classes which were not so regarded, appears at first sight more difficult to maintain. Were not all forms of dependent tenure

<sup>1</sup> Fustel de Coulanges, *Les Origines du Système Féodal*, Chaps. I-VII; Waitz, *Deutsche Verfassungsgeschichte*, II. 1, pp. 290-305; Brunner, *Deutsche Rechtsgeschichte*, II. pp. 246-251; Dahn, *Könige der Germanen*, VIII. 2, p. 89. These are in practical agreement on all essential points.

On almost all the important problems of the origin of the feudal system which have been the subject of so much controversy in the past, a fairly uniform and definite body of opinion has now been formed as a result of the studies of the last twenty-five years. One who wishes to get a clear idea of what this is, confused as little as possible by the comparatively minor points still more or less in dispute, can do it best by putting together the accounts of the origin of feudalism given in those most useful manuals of legal and institutional history, Esmein's *Cours Élémentaire d'Histoire du Droit Français*, and Schroeder's *Lehrbuch der Deutschen Rechtsgeschichte*. Esmein's account of later feudal institutions is also to be highly recommended as the best brief description of feudalism which keeps clearly distinct the strictly feudal, and the non-feudal characteristics of the age. The purpose of the present article does not go beyond the comparison of Mr. Maitland's results with what may perhaps be called the orthodox doctrine of the origin of the feudal system.

as they existed in the eleventh century considered alike feudal? They were so in the popular and wide sense of the word and in that only. Institutionally there were three well marked classes of tenures which the men of that time had no difficulty in distinguishing as classes: feudal, common freehold, and servile.

To the men who worked the feudal machinery the distinguishing mark of the feudal tenure was, that it was upon condition of honorable service. It was not necessary that the thing held should be land. It might be any object of real value or any to which a fictitious value could be given. It was not necessary that the service should be military, though this was so commonly a required service that it was usually taken as the typical one,<sup>1</sup> especially in the phrases knight's service or knight's fee. The one requirement was merely, as in the *patrocinium* contract, quoted below, that it should be service worthy of the free man, the vassal being distinctly *the* free man of feudal days. With this proviso it might be of any sort, and was of great variety, sometimes nominal only.

With this distinction a sharp line was drawn between the feudal tenures proper and the servile. In one respect indeed, no one thinks of confusing these, that is, in the personal position of the holders. But it is important for the present purpose, to notice that the difference in the tenures themselves, leaving the holders out of account, was not one of degree but one of kind, one created by difference of determining cause and purpose, and by difference of origin. In the servile tenures the controlling cause and purpose was purely economic. No other consideration entered into the case. In the feudal proper, the typically feudal, economic considerations were entirely disregarded and those that prevailed were political, drawn from the sphere of public relations. The three chief duties of the vassal, military service, court service, and allegiance, were distinctly public duties transformed into private obligations. As to origin, historically the servile tenures were in existence and presented most, at least, of their characteristic features when the feudal tenures had scarcely begun to form.<sup>2</sup> Legally the feudal tenures originated in a lease, a contract; the servile in the permitted or enforced occupation of a piece of land to be cultivated by the slave in lieu of the general servile labor which the master might demand. Equally significant is the fact that in many parts

<sup>1</sup> *Debet sequi curiam de Broughtone ad rationabiles summonitiones, et facit aliud servitium militare. Ramsey Cartulary, I. p. 413.*

<sup>2</sup> This has been shown with abundance of proof covering the whole manorial organization by Fustel de Coulanges in the volume of his *Institutions* entitled *L'Alleu et le Domaine Rural*. See the same conclusions briefly stated, Brunner, *Rechtsgechichte*, I. 212.



of Europe the servile tenures existed with unchanged functions and results centuries after the feudal proper had entirely disappeared or had lost all their original meaning.<sup>1</sup>

Beyond any doubt the great class of dependent tenures which were servile in character must be regarded institutionally as non-feudal. It is impossible to reason from their growth, their forms, or their characteristic incidents to the feudal. They do not grow out of feudalism nor does feudalism grow out of them. The two systems affected one another, indeed, only as two great systems prevailing in the same society would be likely to do, only as feudalism affected the ecclesiastical organization. The whole manorial system would have prevailed without essential difference if the feudal had never arisen, and the feudal derived no necessary support from the manorial, no support which it could not equally well have derived from arrangements different in kind.

Between the feudal tenures proper and the servile, lay another class of tenures about which it is necessary to speak with more reserve. Certain facts about them are clear. They were described by one of the terms often used of the feudal tenures; they were freeholds. Their holders like the vassals proper were free men. A part of the services by which they held their lands were like a part of those by which the vassal held his, or better, perhaps, by which he might hold some portion of his land. These tenures shade off by imperceptible gradations into those above and below them, especially into the feudal proper, so that it is often difficult for us to distinguish between the two. Often we find that the records of jurisdictions which, in the wide sense at least, we may call feudal seem to draw no line between them, and gradually the state, developing new institutions which were anti-feudal in character and whose range of action was continually widened by the monarchy, tended to confuse the distinction from another side.<sup>2</sup>

<sup>1</sup> Says Esmein, p. 684, in beginning his description of the legal condition of lands in modern France: "Parmi les tenures féodales [in the wide sense], il en est qui se maintinrent à peu près telles que nous les avons décrites aux XIII<sup>e</sup> et XIV<sup>e</sup> siècles; ce sont les tenures roturières et serviles. Les premières avaient acquis alors la pleine patrimonialité, les secondes ne devaient jamais l'acquérir. Mais le fief subit de nombreuses et importantes modifications." See also Schroeder, *Lehrbuch*, pp. 779-787, and the references to the literature there given.

<sup>2</sup> It seems more than probable that the personal freedom of the holder, not the character of the holding, is what accounts originally for the features common to these tenures and the feudal proper. The man is personally free and a part of the same local political organization with the holder of the manor. His small farm has been drawn into the manorial organization by his economic dependence, or by his need of protection in turbulent times, or he has himself taken a holding formed in the manor, but in either case on a footing different from those who hold servile tenures in the manor. He thus stands from the start in a double relationship. The causes which have created his holding draw

On the other hand it is equally evident that a distinction was clearly made and understood in feudal times between these two classes of tenures as classes. There might be question as to individual men or individual holdings in the border land between the two, but there was none as to the broad distinction. It might be that less emphasis was laid on this difference in England than on the continent, because it had much less practical importance there and because the growing institutions of the general government were more directly opposed to it, but it was not the less recognized. The test applied for practical purposes here was the same as in the first case, the character of the service rendered. The feudal was honorable service, knight service, military service. The villain's was servile service. That of the common freeholder was neither quite the one nor the other, but partook imperfectly and in part of both characters. It approached on one side the higher ranges of servile, on the other the lower ranges of honorable service, or more accurately in the latter case, certain public functions which the common freeholder was still called on to perform allied him personally with the feudal class, and led to some appearance of common characteristics of tenure, and in some cases actually to common characteristics. Legally the payment of scutage and the character of wardship were distinguishing marks.

Beyond any real doubt, the same differences of origin and purpose existed originally between these freehold tenures and the feudal

him into the manorial organization, and bring him into a relationship far closer to the class below him than to the class above. As an individual, however, in relation to public affairs, he is classed and acts, so far as he acts at all, with the higher class, though he stands certainly in the background, and is apparently always a second choice. As these public relations become feudalized, the judicial for example, he belongs on one side to the feudal system. As the feudal interpretation becomes the prevailing one, the temptation is especially strong to apply it to the customary freehold, which is certainly not servile and whose holder acts in many capacities with the knight. It becomes easy to attach feudal incidents like homage to such holdings. The confusion in this border land is greater in England than on the continent partly because the local political organization retains there through all the feudal age so much more importance, and partly because when the national judicial system arises, royal and anti-feudal, it finds no reason for recognizing a distinction between these classes which the local system had not recognized and every reason for not doing so. It is an important fact, however, that while the thirteenth century tends to carry over into the class of common freeholds some holdings that would earlier have been called feudal, it does not show the least tendency to obliterate the essential legal distinctions between the two classes of tenures. Littleton shows that this drift out of the strictly feudal class went afterwards somewhat further, but the distinction is still perfectly clear, and remains so as long as feudal tenures proper exist in England. It should be remembered of the thirteenth century in English history that the feudal system was then in rapid decline. The causes which had created it had ceased to exist; they had in fact never existed to any great extent in England. There were no longer any valid reasons back of its distinctions to maintain them. It is impossible to reason from anything which is coming into existence in the thirteenth century to feudalism proper, unless it be by way of contrast.

proper, as between the servile and the latter, though, at least with reference to origin, the evidence for this is less clear. It is difficult to trace the origin of the common freehold tenures of the thirteenth century. They originated undoubtedly in different ways, and three ways are probable. 1. Original small free estates, held in full ownership, but attracted by need of personal and economic protection into the manorial organization. 2. Servile raised in process of time into free. 3. Small feudal tenures in a similar way depressed.<sup>1</sup> Theoretically a fourth might be added of portions of a manor held by free men on payment of a rent like modern tenant farmers, but this practice probably almost or quite disappeared as feudalism was forming,<sup>2</sup> to reappear as settled political conditions arose, certainly very early in England. It is probable that the first class represents the origin of most of these freeholds and that a quality of full ownership always attaches to them as distinguishing them from both the other classes of tenures, as seen for example in the matter of wardship in England, but this cannot be confidently asserted.

As to the controlling purpose of these tenures, however, there can be no doubt. They are economic, not political in prevailing and determining character. This seems to be fully the case so far as the land is concerned. Certain incidents of this tenure seem to approach the feudal because of the personal position of the holders, because certain public duties which once rested upon them as free citizens of the state, still rest upon them, no longer in the old way, but as survivals drawn under the prevailing feudal theory which tends to explain them as incidents of tenure. That is, the apparently feudal characteristics of these tenures did not originate as in the feudal proper as the result of an original contract, but as a feudal interpretation of pre-existing facts. This determining economic character cannot be better stated than in the words of Brunner, in which he formulates the difference between those tenures of Merovingian times, which developed into the feudal, and others similar in some points which did not. Calling attention in a note to the fact that he is not speaking here of lands paying a money rent held by serfs, because they did not rest upon a contract, he says :

“Die der fränkischen Zeit angehörigen Leiheverhältnisse haben sich allmählich in zwei Hauptformen geschieden, nämlich in die des Zinsgutes und in die des Lehens. Man darf jenes als ein Leiheverhältnis niederer, dieses als ein Leiheverhältnis höherer Ordnung bezeichnen.

<sup>1</sup> In Normandy custom finally fixed on the eighth as the smallest subdivision of a knight's fee which could be held by military tenure, smaller fractions being treated as *tenures roturières*. See Brussel, *Usage des Fiefs*, I. p. 174, n. b.

<sup>2</sup> See Fustel de Coulanges, *L'Allen*, pp. 415-416.

An Zwischenbildungen und Übergängen fehlt es nicht und die Grenze ist namentlich in den Anfängen der Entwicklung oft kaum zu bestimmen. Die Verleihung des Zinsgutes erfolgt unter wirtschaftlichen Gesichtspunkten. Der, Zinshof soll dem Herrenhof dienen, durch Fronen, Naturalabgaben oder Geldzinse des Besitzers die Wirtschaft des Herrenhofes ergänzen. Das Zinsgut stellt sich daher als eine Pertinenz des Herrenhofes dar. Die wirtschaftliche Abhängigkeit des Besitzers und die Art der Dienste, zu denen es verpflichtet, charakterisieren es als ein Leiheverhältnis niederer Ordnung, welches sich schliesslich derart ausgestaltet, dass es die öffentlich-rechtliche Stellung des Beliehenen beeinflusst und eine Schmälerung der vollen Freiheit nach sich zieht.

“Dagegen geschieht die Vergabung des Lehens nicht zu wirtschaftlichen, sondern zu öffentlich-rechtlichen Zwecken. Der Beliehene soll nicht dem Grundbesitz, sondern der Person seines Herren dienen, er soll ihm nicht wirtschaftliche sondern öffentlich-rechtliche, insbesondere militärische Dienste leisten. Die Leistungsfähigkeit des Beliehenen darf einerseits nicht durch die Bewirtschaftung des Leihgutes absorbiert werden, das Gut muss seine persönliche Arbeit entbehren können. Andererseits soll es ihm eine derartige ökonomische Stellung gewähren, dass es die lehnmässigen Kriegsdienst davon zu leisten vermag. Demgemäss können nur wirtschaftlich selbständig und grössere Güter, solche auf welchen die bäuerliche Arbeit in der Hauptsache von Knechten oder Hintersassen besorgt wird, den Gegenstand des echten Lehens bilden, abhängige Höfe nur insofern, als dem Lehnmann ihre Rente zugewiesen wird. Eine wirtschaftliche Abhängigkeit von einem Herrenhof, eine Schmälerung der vollen Freiheit führt das Lehen nicht herbei; es ist darum ein Leiheverhältnis höherer Ordnung.”<sup>1</sup>

This states the case exactly for these small freeholds of whatever origin, and for the Saxon as well as for the Frankish state. It is into the manorial not the feudal organization that they are forced by the exigencies of the time. Whether in any individual case the need of personal protection or the lack of economic independence brought about the change is not important. The essential fact is that it is the manorial system which incorporates and controls them. Their relation to public life and to the growth of institutions is determined by this relationship. They represent in other words, so far as our problem here is concerned, nothing different from the servile class. The changes which affect them in the formative age are not changes toward feudalism proper. The transformation of their tenures into dependent tenures brings them into the manorial not into the feudal system.

These two classes of dependent tenures are those which pass on most nearly unchanged from the Saxon into the Norman state. Besides these we have in the earlier period a variety of other holdings, more or less dependent, not very clearly defined in their legal characteristics, but concerning larger estates and more important persons,

<sup>1</sup> Brunner, *Rechtsgeschichte*, I. 209.

—the king, bishops, earls, and thegns,—in their relations with one another. Of these nearly all those which do not fall into the class to be noticed in the next paragraph seem to be cases of real dependent tenure, originating in the desire for the protection or in an attempt to purchase the influence and favor of some powerful person. It is among these forms that we find the nearest approach to those out of which feudalism grew. Parallels for them all are to be found in the variety of cases which lie around the line of descent of feudalism proper in the Frankish state, but this is all that can be said of them. They represent the operation of those political and economic causes which were the great motive forces in creating feudalism. Had these forces had in Saxon England the same formal elements to work upon which the Franks had inherited from Rome, the *precarium* and the *patrocinium*, we might possibly have had the same result there, instead of a few unimportant cases of verbal imitation. The fact should not be overlooked, however, that of all the provinces of the Roman Empire in which these elements existed, where the Germans settled, and where beginnings which seem to be the same were made, Gaul alone produced institutional feudalism. Britain produced, among all these forms, nothing really like it, not even the beginning of it.

One other form of tenure existed in Saxon times which needs to be noticed. That is the class of grants of limited ownership, of full ownership so far as the grantee is concerned, or even his heirs, but with no right or a very limited right, of conveyance to others; "he cannot go with the land where he pleases." These grants, common to various Teutonic peoples, whose existence was long maintained by Waitz but has been fully demonstrated by Brunner in one of his most masterly studies,<sup>1</sup> had much more frequent use and a longer life in the Saxon than in the Frankish state, but they were not in any respect the ancestors of feudal grants. The practice of making them made it natural and easy for the Franks to take up the Roman tenures from which the feudal did grow, as these had been developed by the church, and in many cases doubtless to bring grants of the old limited sort under the new principle, but they influenced the formation of the feudal system in no other way. Had the feudal tenures grown up in Saxon England as in the Frankish state their greater usefulness and adaptability to the purposes sought would have driven these more primitive and clumsy Teutonic forms out of common use long before the Conquest.

<sup>1</sup> *Die Landschenkungen der Merowinger und der Agilolfinger* in the *Sitzungsberichte der Berliner Akademie*, 1885, pp. 1173-1202. Reprinted with some additions in *Forschungen zur Geschichte des Deutschen und Französischen Rechtes*, 1894.

II. The subject of jurisdiction is one of the most difficult connected with the feudal régime. The variety which everywhere reigns in feudalism is especially characteristic of this side of it and makes it by no means easy to distinguish the ideas which control it. The briefest attempt to give any discriminating account of what was included under feudal jurisdiction in the wide sense would far exceed the limits of any REVIEW article. Happily it is not necessary for our purpose to make the attempt. No one has ever suggested, so far as I am aware, that feudalism was created by the growth of private jurisdictions, nor is anyone ever likely to do so. Any possible development of these practices would leave so much that is essential to feudalism unexplained that the relation of cause and effect does not suggest itself. Private jurisdiction was, like the manorial organization, one of the side products of those conditions which, along another line, produced feudalism; a product which feudalism, once created, absorbed into itself and made its own as it did the manorial system. Still, some consideration of the subject is necessary here, because in the first place this feature is so truly characteristic of feudalism in the wide sense, and in the second, because it is this development which leads to the absorption by feudalism of one department of public law, and to the translation into private obligation of one line of public duty.

In the discussion it is necessary to distinguish clearly, for theoretical purposes at least, three distinct lines of jurisdiction which were probably in practice more mingled together in England than elsewhere in the feudal world, though this mingling existed to some extent everywhere, and was indeed inevitable. These are first, manorial jurisdiction proper; second, public jurisdiction in private hands; third, feudal jurisdiction proper.<sup>1</sup> However confused they might be in practice, these three are clearly distinct in theory and they were distinct in historical origin.

Jurisdiction over the unfree population on large estates which were managed as a whole—over their disputes and offenses among themselves, over questions which concerned the estate and its population alone—apparently began in Roman days;<sup>2</sup> it certainly began long before institutional feudalism arose. This was the beginning of manorial jurisdiction proper, and this remained its character when

<sup>1</sup> See the discussion of this subject in Flach, *Origines de L'Ancienne France*, Vol. I., Bk. II., especially Chaps. VIII. and IX. He emphasizes: La distinction entre la cour des pairs siégeant comme vassaux et la cour des pairs siégeant comme fidèles [subjects]—distinction qu'il ne faut jamais perdre de vue, sous peine de ne rien comprendre au fonctionnement de la justice pendant les X<sup>e</sup> et XI<sup>e</sup> siècles ni à son sort ultérieur.

<sup>2</sup> Flach, *Origines*, pp. 73-78; Beaudouin, *La Recommandation et la Justice Seigneuriale*, pp. 108-122; Fustel de Coulanges, *L'Alleu et le Domaine Rural*, pp. 450-452.

considered by itself alone. It was a jurisdiction over manorial disputes and offenses only. It had, strictly speaking, nothing to do with feudalism, either in origin or in character.<sup>1</sup> That it attracted into itself, that is into the manorial proper, in the end many free tenants was due mainly and probably originally to their economic dependence on the manor; later it was also due in part to the transfer of public jurisdiction to private hands and in part to the influence of the feudal theory. It was this jurisdiction also, freed from the feudal proper, and except in very minor matters from the public, which in England survived the age of feudalism.<sup>2</sup>

Later we have the beginning of a new jurisdiction of a public character added to the manorial in a certain number of cases; the germ out of which would grow in the end a greatly enlarged private jurisdiction, covering questions and persons not belonging primarily to the manor, as well as in these matters the free population of the manor itself, by the formal putting of the lord in the place of the state for a given district, or possibly in some cases by the transfer to him of an entire local court. It is at this point in the development of these institutions that the immunity exercised such an important influence, and it is upon this process in Saxon England that Mr. Maitland has thrown so much new light, but he has not made it apparent that Saxon private jurisdiction had advanced beyond this point before the Conquest. This process, well under way in the age when feudalism came into existence, was greatly aided and enlarged by the breakdown of public authority under the later Carolingians. Grants of this sort were rapidly multiplied, almost as an open confession of the weakness of the government. Usurpation took the place of an actual grant in many cases. The count transformed his public office into a private possession, and the line of connection between the state as public authority and its officers was weakened or broken from many causes.

But it was during this age also that feudalism proper was fixing itself in the Frankish state and becoming the controlling element in what general organization survived. It was natural and inevitable

<sup>1</sup> La justice domaniale, qu'on appellera bientôt justice seigneuriale, est encore un peu vague et indéfinie au huitième siècle. Avec le temps, elle se précisera et prendra des règles fixées. Nous avons seulement constaté ses origines; elles sont dans la nature du droit de propriété et dans l'organisme constitutionnel du domaine; elles n'ont rien encore de féodal. Fustel de Coulanges, *L'Allou*, p. 461. Seignobos, *Le Régime Féodal en Bourgogne*, pp. 236-243, is an argument to show that manorial jurisdiction is not of feudal origin, but is derived from the right of property.

<sup>2</sup> See the character of this jurisdiction in Maitland and Baildon, *The Court Baron*, *Selden Society*, Vol. IV. The manorial court records of Maryland, printed by J. Johnson in Vol. I. of the *Johns Hopkins University Studies in History*, give interesting examples of this jurisdiction as transferred to America in colonial times.

that this system of private jurisdictions, though of independent origin, should be absorbed by it and worked over according to its own theories. The lord of the manor was by this time, not in every case, but generally, a link in the feudal chain, at least every feudal senior was lord of a manor. His view of his relations to those above him determined his interpretation of the relation to himself of those below. Tenure became the one explanation of everything which was capable of explanation by it. Jurisdiction followed from it. The duty to be subject to the lord's court and to assist in its operations resulted from it and private jurisdiction took on that feudal character proper which it had lacked in the great age of the immunities, and which it never possessed in Saxon England, that is it became one of the elements of a contract.

Compared with this feudalization of public justice, the third kind of jurisdiction, the feudal proper, was always, in England at least, insignificant. What this was may be stated in the words of Brussel : " C'étoit une maxime universellement pratiquée en France, que tout suzerain avoit cour plénière sur ses vassaux, au regard de leurs fiefs "; or of Hoüard : " On a prouvé, article Fief, que tout seigneur avoit cour plénière sur ses vassaux, en ce que touchoit les fonds qu'il leur avoit inféodés."<sup>1</sup> It was a jurisdiction over those holding fiefs only, in matters which concerned their fiefs only, or in offenses which concerned themselves only, mainly in this last case offenses which concerned lord and man. This is the jurisdiction which is meant by the judgment of peers in C. 39 of Magna Carta. In parts of Europe this jurisdiction on its civil side resulted in something important and permanent, but in England though there are evidences of its existence as a separate jurisdiction, and though the barons at one time seem disposed to insist upon it so far as the king's court is concerned, apparently as a means of checking royal encroachments upon their own jurisdictions, it never amounted to anything even in the age of the highest development of feudalism in the kingdom, the first three quarters of the twelfth century.<sup>2</sup>

<sup>1</sup> Brussel, *Nouvel Examen de l'Usage Général des Fiefs*, I. p. 260. Hoüard, *Dictionnaire de la Coutume de Normandie*, III. p. 394, Art. " Pair." There is a great literature of feudalism, both French and German, of the seventeenth and eighteenth centuries, especially of the latter, but it can be used for historical purposes, as evidence regarding the institutions or ideas of the great age of feudalism, only with the greatest caution. But the aim of Brussel was distinctly historical and he had the spirit of the true historian, though under unfavorable conditions. This can be said of Hoüard only in a less degree.

<sup>2</sup> The evidence shows, I think, that a court of this sort—of vassals acting as peers, and considering only feudal cases in the strict sense—met only on the special summons of the lord, which might be for his own purposes or on the demand of a vassal, and the vassal's case was liable to be tried by the lord's ordinary court unless he demanded trial



This fact was characteristic also of Normandy, though to a rather less extent, and for the same reason, the great power of the sovereign and the great centralization of government as compared with the most of the feudal world. There are other reasons for this state of things in England which it is not necessary to go into here. By the end of the thirteenth century this jurisdiction had lost what little significance it had ever had. The attempt to save it, made in the interest of the overlords in the Magna Carta, was practically abandoned before the close of the reign of Henry III. A little later the Statute of *Quia emptores* made an end of any possibility of the growth of it, at a time when the *Quo warranto* proceedings were checking the enlargement and even curtailing the extent of the public jurisdiction in private hands. But at that date the feudal system had come to an end in England in every respect, except as the basis of a nobility and as mere land law, because of the general transformation of conditions.

The influence of this feudal jurisdiction proper upon the general institutions of England is to be found almost alone in the evolution of the modern judicial system out of the king's court, and in the working of the principle of trial by one's peers.<sup>1</sup> More important from our present point of view is the absorption of the independently originating private control of public jurisdiction into feudalism, and the working of it over in harmony with the prevailing idea of contract. The essential fact is, that it became a part of the service by which the vassal held his land to help to form the lord's court when called upon to do so, and that even the court duty of the common

by his peers. We may go so far, I think, as to say that no court meeting at fixed intervals was a strictly feudal court. It was a court of mixed jurisdiction though often deciding feudal questions. Most of the early law books of modern Europe—those written before the close of the thirteenth century—are books of the mixed law enforced in these courts, though feudal law proper fills the larger part of each book. If feudal law and criminal law be taken out hardly anything, indeed, is left. The Lombard feudal code, the *Libri Feudorum*, is a pure feudal code except for some provisions in the two *Landfriedens-Gesetze* which it incorporated. Glanvill's book is, from one point of view, the most interesting of all these early law books. Written at a date when, if it had been composed in any other country, it would have been chiefly feudal law, when feudalism in England had only just begun its final decline, and containing indirectly a great deal of feudal law, it is nevertheless written from a point of view not merely non-feudal but opposed to feudalism. Its most important contribution to general, as distinguished from legal history, is the evidence which it gives of the serious inroads upon the feudal system which a powerful executive had already been able to make.

<sup>1</sup> It is a rather interesting fact that, while in France and not in England there was active protest on the part of the barons against the presence in the king's court of a bureaucratic element in the trial of members of their order, it is in England and not in France that the barons secured a real right of trial by their peers. This right would have been lost in England as well but for the peculiar form of the development of Parliament in that country.

freeman was in a vast proportion of cases transformed by this idea. But this was a result of completed feudalism, not a part of the process by which it was created.

III. In regard to military tenures, Mr. Maitland refers to three groups of facts which appear to him to indicate that the Conquest introduced no practical differences in this matter, or that at most it introduced only a theory more fully developed from similar facts.<sup>1</sup> These groups of facts are: 1. Those indicating that a definite burden of military service rested upon a definite portion of land. 2. Those showing that this service was often performed by one of a group of men, the others uniting to sustain him in the field. 3. Those which seem to show that the state often held the great lord, a former owner, responsible for this service, and that he in turn exacted it from the present holders to whom he had conveyed portions of his lands by some limited right of ownership. The man is responsible not to the king but to the lord.

I shall only refer here to Mr. Round's criticism of these views, especially of some points connected with the last. He appears to me to have shown clearly that these facts are capable of presentation under quite another aspect.<sup>2</sup> What is here proposed is to raise the question whether, accepting Mr. Maitland's account as it stands, we should still have feudalism or any real approach to it.

Mr. Maitland refers to the similarity between these arrangements and those which existed in the Frankish state, and the comparison is interesting and for our problem decisive. He says: "Already in the days of Charles the Great the duty of fighting the Emperor's battles was being bound up with the tenure of land by the operation of a rule very similar to that of which we have been speaking. The owner of three (at a later time of four) manses was to serve; men who held but a manse apiece were to group themselves together to supply soldiers. Then at a later time the feudal theory of free contract was brought in to explain an already existing state of things."<sup>3</sup>

The statement of this "rule" which is here made is accurate. Whatever may be one's opinion upon the disputed question, whether originally in the Frankish state the burden of military service rested upon the land or upon the individual, there is no dispute as to the existence of these arrangements under Charles, and they continued in use for some time. What was the reason for their existence? They were part of a conscious attempt made by the kings to save

<sup>1</sup> *Domesday Book and Beyond*, pp. 156-161.

<sup>2</sup> *English Historical Review*, Vol. XII., p. 492.

<sup>3</sup> *Domesday Book and Beyond*, p. 161.

the old Frankish military system from the collapse which was threatening it from a variety of causes, one of which was the growth of feudalism. In the Saxon state they indicate undoubtedly the same condition, the difficulty of getting the old military service. They were not feudal in themselves. They were not in the line of the development of feudal military service. Quite the contrary. They represented an earlier, contrasted, to a certain extent even a rival form of military service which was being driven out of the field by feudalism, and which finally succumbed to it, never completely but as the main dependence of the state. The first and last sentences quoted above convey, I believe, an entirely wrong impression. No operation of this rule bound up the duty of fighting battles with the tenure of land. No theory of free contract was ever brought in to explain this state of things. Tenure by military service and the theory—the fact of free contract entered into possession of the field by an entirely different road; they were already entering into it at the moment of these regulations.

Mr. Maitland could have extended his comparison with Frankish institutions to the last of the three groups of facts—to the idea of the responsibility of the lord for the military service of the men of his lordship. What looks very much like it is to be found alongside the Frankish practices described above. The senior, with the sanction of the king, summoned his men to perform their military service and led them into the field as his own force, under his individual responsibility.<sup>1</sup> The army was composed partly of contingents representing the old general levy under the arrangements described in the last paragraph, led by the count, partly of contingents of men led by their lords.

The use which the state made of the growing feudal system in this way exerted a decisive influence upon it, not in creating it but in stimulating and perpetuating it. This was by no means the intention of the state. Its purpose in this case was the same as in the other arrangements, to obtain by means of a temporary expedient the military service which it must have and could no longer get in sufficient amount under the old system. The result was, however, to hasten materially the transformation of the citizen army into a feudal army, and to continue under a new form the sanction

<sup>1</sup> Les capitulaires imposèrent au senior, sous sa responsabilité personnelle, l'obligation de réunir et de conduire ses hommes à l'armée en cas de convocation." Esmein, *Cours Élémentaire*, p. 127.

"Die Senioren hafteten für die Strafe des Heerbannes, wenn ihre Leute sich dem Dienste entzogen. Für die Gruppen der ärmeren Heerpflichtigen übernahmen ihre Senioren die Beschaffung der Stellvertreter und erhoben dafür die von den Wehrpflichtigen zu zahlende Beisteuer." Schroeder, *Lehrbuch*, p. 155.

which the state had granted the feudal organization at its birth. It was not, however, the mere fact that the lord might be made responsible for the service of his dependents that brought about this result. It is conceivable that such a system of responsibility might exist of more than one kind and in a highly developed form, without involving any feudal arrangement. What made this expedient eventful in the history of feudalism was, that the state was making use of an already existing private obligation to take the place of a public duty which it was finding it extremely difficult to enforce in any other way. The essential fact is not that the state called upon the lord to assist in the enforcement of a public duty, and so created a new system for the performance of that duty which we call feudalism, but that it allowed and encouraged the substitution for this duty of a system of private obligations which had long before been created without the assistance and originally even without the sanction of the state, wholly in the field of private law, and which had long before this date taken on a prevaillingly military character.

It should be remembered always that the element of military service was not essential to feudalism. It was one of a number of forms of service, made especially prominent by the conditions of the time, but no more indispensable than any of the others, no one of which was essential. The idea of honorable service was essential, but that was rarely embodied in a single form of service and when it was, it was not usually the military which was chosen. That is to say, when we have shown how the military element entered feudalism we have not explained the origin of the feudal system itself. Its own origin lies back of the military element in it. When we have discovered how it came to absorb into itself the public duty of military service, we have done no more than when we explain how it appropriated the judicial function of the state. There still remains the task of showing how the system itself arose.

In connection with the subject of military tenures Mr. Maitland admits, as fully as anywhere, the introduction at the Conquest of a contractual element which was lacking in Saxon days, but he is not disposed to see in this a matter of any importance. I shall not presume to dispute the opinion of so able a lawyer that as a matter of law the presence or absence of the contractual element is merely of theoretical and not of practical importance, that at most it is a question merely of legal logic, though I may be surprised that it should be so considered.<sup>1</sup> But in the field of institutional history

<sup>1</sup> See the quotations in note I, p. 12. Statements of this kind are unexpected, at least, from one who is before all else a historian of law and institutions. The legal his-

certainly the case is different. There the one vital fact is that at the beginning of English constitutional history the public law of the state was brought under the controlling influence of private contract, that public duties were, as I have already said, transformed into private obligations. It was upon this idea that feudalism took its stand for self-defence against the attack of a powerful monarchy begun, indirectly and in ways not easily felt to be dangerous, by Henry II., continued more openly, so that the drift of things was more plain but not in reality more dangerous, by John. Forced into new prominence in this way as the principle of resistance, the idea of contract became the leading element in a new growth, the growth of the constitution, as I endeavored to show, too briefly, in an earlier volume of this REVIEW.<sup>1</sup>

Nor is this idea of contract a late idea, brought in as a theory to explain already existing facts. It goes back as a characteristic and controlling fact to days even before the origin of feudalism in one at least of the earlier institutions out of which the feudal system grew, the *patrocinium*; and it is only less prominent in the other, the *precarium*. In the *patrocinium*, which is the source of the personal side of feudalism,<sup>1</sup> it was made especially emphatic. A char-

torian has often been accused of tracing too sharply the formal line of connection between an earlier institution and its later descendant, and of insisting too strongly upon it. The criticism has only so much truth, that sometimes an unusually clear vision of the importance of the formal line of descent has led to a neglect of the social and economic forces which continually modify forms and shape results. But in the historic, as in the geologic past, a later form is always the outgrowth of an earlier, and can no more be understood in the one case than in the other without a knowledge of its ancestor. It is impossible to emphasize this principle too strongly where what we are primarily interested in is the constitutional result of a group of legal forms. In this particular case it would be enough to say, could it be so said as to carry understanding with it, that the exact legal forms out of which formal feudalism grew, either upon the personal or upon the land side, have never yet been discovered in the Anglo-Saxon state. We may be sure, I think, after this study of Maitland's, that they never will be, at least as anything but very exceptional cases.

<sup>1</sup> Vol. V., pp. 643-658.

<sup>2</sup> Brunner is, I believe, the only scholar of authority who still derives vassalage directly from the comitatus. *Deutsche Rechtsgeschichte*, II., pp. 258-274. He holds this opinion, however, in quite a different form from the original comitatus theory. He rests it upon various points of similarity between the comitatus and the later vassalage, but some of these were features of the *patrocinium* as well as of the comitatus; some indicate the influence of the comitatus in modifying the *patrocinium* as it grew into vassalage proper, and some would probably be common to any personal relationship between lord and man. These considerations lose all force in face of the positive argument for the *patrocinium* origin as developed by Fustel de Coulanges, *Origines*, pp. 192-333; and Ehrenberg, *Commendation und Huldigung*, *passim*, especially pp. 131-141. See also the conclusive answer of Brunner's argument by Dahn, *Könige*, VIII. 2, pp. 151 ff, and compare Waitz, *Verfassungsgeschichte*, IV., pp. 249 ff. The commendation of the landless man—the *patrocinium* proper—as an element in the origin of feudalism, is not discussed by Maitland because Domesday Book is not concerned with cases of the kind,

acteristic formula of commendation, which is one of those often quoted to illustrate its features, will make this evident :

Domino magnifico illo ego enim ille. Dum et omnibus habetur per-cognitum, qualiter ego minime habeo, unde me pascere vel vestire debeam, ideo petii pietati vestræ, et mihi decrevit voluntas, ut me in vestrum mundoburdum tradere vel commendare deberem ; quod ita et feci ; eo videlicet modo, ut me tam de victu quam et de vestimento, juxta quod vobis servire et promereri potuero, adjuvare vel consulare debeas, et dum ego in capud advixero, ingenuili ordine tibi servicium vel obsequium impendere debeam et de vestra potestate vel mundoburdo tempore vitæ meæ potestatem non habeam subtrahendi, nisi sub vestra potestate vel defensione diebus vitæ meæ debeam permanere. Unde convenit, ut, si unus ex nobis de has convenientiis se emutare voluerit, solidos tantos pari suo componat, et ipsa convenientia firma permaneat ; unde convenit, ut duas epistolas uno tenore conscriptas ex hoc inter se facere vel adfirmare deberent ; quod ita et fecerunt.<sup>1</sup>

That this is a legal contract is plain enough, both from the even exchange provided for and from the arrangement specified by which either party may terminate the agreement at will. If one party is clearly in a condition of economic inferiority which affects the practical character of the bargain which he can make, it is also clear that in legal status he is on an exact equality with the other party. This is proved, if it were not plain from the agreement itself, by the term *pari suo*, whether we understand this to mean the other party to a contract, which seems to be the only natural meaning in the majority of the formulæ, or "his peer" as M. Fustel takes it here,<sup>2</sup> referring to the fact that the document puts them on an equal footing and subjects both to the same penalty. This feature of the *patrocinium* never disappears from feudalism, nor even declines in importance so long as the system lasts. If later feudal lawyers might have hesitated to call the lord the peer of his vassal, lord and vassal always remained peers in questions of the feudal contract, which was equally enforceable by either party in the lord's court or in that of the lord's suzerain. The reluctant lord could even be forced by his vassal to accept homage and grant investiture, an extension of the idea foreign to the original system, and indeed the sign of an important change.

It is not necessary to add to this any description of this feature in the benefice, but if the original Roman *precarium* was not a con-

but the same thing is to be said of it as was said of the *precarium* above. No development of it by itself could have produced the institutional feudalism of the eleventh century.

<sup>1</sup> *Formula Turonenses*, No. 43, Zeumer, p. 158 ; Rozière, I., p. 69. On the character of commendation as a contract see Ehrenberg, *Commendation und Huldigung*, pp. 90 ff.

<sup>2</sup> *Origines*, p. 271.

tract, and if the holder had no standing in the courts as against the grantor, this is one of the features which began to enter into it as it grew toward the benefice and the fief. As *precarium* grants for limited times with some pecuniary return became frequent, and especially when specifications began to be introduced that the holder could not be disseised because he failed to pay promptly on the fixed date, the arrangement assumed more the character of a contract. It became a quasi contract, as Fustel calls it,<sup>1</sup> and though the right of the doner to protect his holding was always imperfect during the formative period, the *precarium* was rapidly becoming a true contract when it was absorbed in feudalism through its combination with the personal relationship which had grown out of the original *patrocinium*.

It is this combination which forced the idea of contract, though it had been, to the extent stated, a feature of both the prior institutions, to the front as the controlling idea of the new result. The necessary reason for this union was the making of a contract, and in such a way as to secure its fulfilment. The prince who saw himself compelled in as short a time as possible to transform the originally unmounted Frankish army into a mounted force, must make sure that the land with which he provided the senior would be used to pay the expenses of putting his men on horseback, and to this end he began to require in frequent cases that the senior become his vassal with these obligations of service. This practice united the benefice and vassalage as the two sides of a new relationship, and by this feudalism proper was created. I cannot avoid the conclusion that the fundamental difficulty with those who see feudalism existing or forming in the Anglo-Saxon state is that they overlook the importance of this union in the creation of institutional feudalism proper. But the reason of the union was to create and enforce a contract, and this remained always the reason of this union which continued to be prominent and emphasized as long as feudalism had any existence at all.

This contract idea is, indeed, through all the varying forms and transformations of the feudal age the one thing which is permanent and distinctive, the one constantly controlling element. The effort to define clearly its nature, incidents and results, to protect the interests now of one party to it, now of the other, to hold these two conflicting interests each within its sphere and to mediate between them, gave us feudal law. The effort to embody this principle in visible forms and symbols, and to get the necessary business of the state performed through its agency and in harmony with it, created feudal institutions.

<sup>1</sup> *Origines*, p. 149.

If this contract idea was not a test by which feudalism itself consciously distinguished between the feudal and the non-feudal, it was involved in the test and it constituted the real difference.<sup>1</sup> Where we find at any time what seems to be an analogous idea affecting the non-feudal tenures it is because the principles which prevailed so strongly in the higher sphere have influenced the interpretation of different arrangements in the lower, and worked them over by its own analogy. And, until we come to the time when we have actual bargains made between lord and commune, or between lord and rural community or group, the arrangements were really different. Nor did they ever develop as a whole into really contractual relations. Originally the serf in his permitted or compelled holding had no rights which he could protect, and if he acquired these in the end he did it by the way of prescription, by putting limitations on the lord's right of exaction, not by enforcing anything in the way of an original contract. And the case of the small, non-feudal freeholder was not different in principle. Probably his relation to the lord had in many cases originated in something much more like a contract than anything in the case of the serf—a contract affecting the land, however, not the personal relationship—but the economic influences which had caused the original action continued to be the prevailing influences and incorporated the free holding more and more closely, in the manorial organization.

It would be a mistake to assert that no other idea than that of contract is to be found at work in the public relations of the feudal age. Feudalism was a system of legal notions and practical usages of a peculiar sort, growing out of peculiar and temporary conditions partly economic and partly political, superimposed upon an older, very different and very firmly fixed governmental system. This system it nowhere destroyed. There was always, even where feudalism most completely triumphed, inconsistency and conflict from the existence in the presence of each other of these two radically different and inharmonious sets of ideas and institutions. There is no feudal state, for example, regarded as a feudal state, where the kingship is not illogical, a source of contradictions in institutions and law, and of irreconcilable practical difficulties in their operation. The feudal system logically demanded a supreme suzerain at the top of the hierarchy. But the king was not this alone as, looked at from the feudal side, he should have been, not even in such a state

<sup>1</sup> Whether we say that the essential and distinguishing feature of feudalism proper was the contract idea, or honorable service with what that implied, or the union of vassalage and the benefice, makes no great difference. The form of the expression will depend on which aspect of the single fact we are inclined to emphasize. In real meaning, in institutional significance, we have said the same thing in each case.



as the kingdom of Jerusalem. Far the larger part of the conception of his office which always prevailed was derived from the older non-feudal system. His rights and prerogatives, his duties even, conceived of definitely enough as to existence and direction, but very vaguely as to application and limitations, constantly clashed with feudal rights.

It was from the conflict between these two systems that modern constitutions arose. Everywhere before the end of the middle ages feudalism as a system for the organization and government of society disappeared, largely because the conditions which had created it and from which it drew its strength had passed away. But everywhere it left its mark upon the institutions which took its place. England, of course, forms no exception to this rule. What is exceptional, however, is that in England this fundamental and all-controlling principle of feudalism, the idea of contract, that the services and obligations even of the highest suzerain and his vassals are mutual, alike binding upon both, passed over from the feudal system as it declined into the victorious monarchical system and became, enlarged in meaning and application to fit the new conditions, as fruitful and determining in institutions and law as it had been in the previous age. This is the fact which created the constitutional difference which existed in the fifteenth century between England and all other European states, and this is the fact which makes the question of the introduction of this idea into English history of great importance and the idea itself of profound institutional significance.

Neither this idea nor the institutions in which it was embodied are to be found in Anglo-Saxon England. We do find there a variety of pre-feudal institutions and practices, dependent tenures, private jurisdictions, and military arrangements, partly economic and partly political, but these, in all their essential features, making due allowance for local variation, were paralleled in the history of Frankish institutions. In the line of strict institutional descent, they had nothing to do with the origin of feudalism. They were, however, either produced or nourished by that condition of society which produced and nourished the institutional germs of feudalism. They were perhaps as characteristic products of that society as those others from which feudalism did spring. They made in some cases contributions to forming feudalism which modified it in more or less important ways, and so characteristic of this society and inseparable from it were some of them that they survived the completion of the feudal system and were adopted by it, becoming as characteristic features of the feudal society as they had been of the society out of which feudalism grew.

I cannot close this article with any better statement of conclusions than is made in one of the closing paragraphs of Waitz's account of the earliest stages of feudalism in the fourth volume of his *Deutsche Verfassungsgeschichte*. He says (p. 360):

“Aenliche Bedingungen haben wohl damals und sonst bei anderen Völkern verwandte Erscheinungen hervorgerufen wie sie hier entgegen-treten. Aenliche Culturverhältnisse erzeugen im Völkerleben überhaupt in einem gewissen Mass übereinstimmende Bildungen. Aber immer haben solche dann doch in jedem einzelnen Fall ihr eigenthümliches und unterscheidendes, und die tiefer eindringende Forschung hat ihr Augen-merk besonders eben hierauf zu richten. Hörigkeit und Schutzver-hältnisse verschiedener Art, Verbindung von Angehörigen des Volks mit höher gestellten Männer oder den Herrschern eines Staats zu besonderem Dienst, Verleihung von Land, privatem oder öffentlichem, gegen ver-schiedenartige Verpflichtung, Uebertragung auch von Hoheitsrechten zu einem gewissen selbständigen Recht an Statthalter und andere einzelne Personen oder an Corporationen kommen in der Geschichte der Völker wiederholt vor. Aber die eigenthümliche Form der Vassallität und des Beneficialwesens, mit dem Einfluss den sie auf die ständischen und die allgemein staatlichen Verhältnisse erhielten, hat sich nur im Fränkischen Reich erzeugt, auch nicht bei den verwandten Germanischen Stämmen in Britannien und Skandinavien. Und erst von den verschiedenen Theilen des Frankenreichs aus hat später eine Uebertragung auf andere Landen Europas und eine Zeit lang selbst Asiens stattgefunden. Was sich dort entwickelte, ist deshalb nicht bloss für die aus dem Franken-reich hervorgegangenen Staaten, sondern im weiteren Umfang für die abendländischen Nationen überhaupt einflussreich geworden. Darin mehr noch als in dem was diese Verhältnisse in der Karolinischen Zeit selbst waren liegt ihre grosse geschichtliche Bedeutung.”

Since these words were written, every new investigation, sifting the evidence more and more thoroughly, of which *Domesday Book and Beyond* is a fine instance, only serves to confirm their truth.

GEORGE BURTON ADAMS.